STATE OF MICHIGAN

COURT OF APPEALS

CRYSTAL MCCASKILL,

Plaintiff-Appellant,

and

LEWIS SMITH, P.H.D., P.C.,

Intervening Plaintiff,

v

USAA CASUALTY INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
June 20, 2013

No. 310068
Wayne Circuit Court
LC No. 12-000760-NF

Before: WHITBECK, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition for defendant in this no-fault insurance action. Because plaintiff's statement that she was not living with Kenneth Birberick, defendant's insured, at the time of the accident was an evidentiary admission rather than a judicial admission, and plaintiff presented evidence to establish a justiciable question of fact regarding whether she was living with Birberick and was therefore entitled to recover personal protection insurance (PIP) benefits from defendant, we reverse and remand for further proceedings.

This case arises out of a motor vehicle accident that occurred in Las Vegas, Nevada on January 29, 2010. Plaintiff maintains that she is entitled to PIP benefits from defendant as an "Additional Covered Resident" under Birberick's policy. The "Additional Covered Resident Endorsement" contained in the policy provides that "[t]he Additional Covered Resident has all the coverages in the auto policy, as shown in the Declarations, as long as the Additional Covered Resident is a resident of the named Insured's household." The trial court granted summary disposition for defendant based on plaintiff's deposition testimony that Birberick, plaintiff's boyfriend, moved out of their home one month before the accident.

We review de novo a trial court's decision on a motion for summary disposition. *Hill v Sears, Roebuck & Co*, 492 Mich 651, 659; 822 NW2d 190 (2012). A motion for summary

disposition pursuant to MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). In reviewing a motion under subrule (C)(10), we consider "the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Brown v Brown*, 478 Mich 545, 551-552; 739 NW2d 313 (2007). "Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to a judgment as a matter of law." *Id*. at 552.

Plaintiff argues that the trial court erroneously granted summary disposition for defendant because her statement regarding Birberick moving out of their home was not conclusive on the issue of residency. In particular, plaintiff contends that the trial court failed to recognize the distinction between judicial admissions and evidentiary admissions. Although plaintiff did not assert that specific argument in the trial court, review is not precluded. "This Court may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Whitman v Galien Twp*, 288 Mich App 672, 678; 808 NW2d 9 (2010) (quotation marks, citation, and brackets omitted). Because review of plaintiff's argument is necessary for a proper determination of the case and the issue involves a question of law regarding which all the facts necessary for its resolution have been presented, we will review the issue.

Our Supreme Court differentiated between judicial admissions and evidentiary admissions in *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 419-421; 551 NW2d 698 (1996). In that case, the Court recognized that admissions pursuant to MCR 2.312 are "judicial" admissions, while admissions of a party opponent under MRE 801(d)(2) are "evidentiary" admissions. *Id*. at 420. "[J]udicial admissions are not really 'evidence' at all," but "[r]ather, they are formal concessions in the pleadings in the case or stipulations by a party or its counsel that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact." *Id*. (citation omitted). "The party who makes such an admission has conclusively (or 'judicially') admitted such facts . . . and the opposing side need not introduce evidence to prove the facts." *Id*. (quotation marks and citation omitted). "Although both judicial and evidentiary admissions are subject to all pertinent objections to admissibility that might be interposed at trial, the judicial admission, unless allowed by the court to be withdrawn, is conclusive in the case, whereas the evidentiary admission is not conclusive but is always subject to contradiction or explanation." *Id.* at 420-421 (citations and footnote omitted).

In this case, plaintiff's statement that Birberick had moved out of the Hudson Avenue home one month before the accident, and was therefore not living with her at the time of the accident, was an evidentiary admission subject to contradiction or explanation. Plaintiff made the statement during her deposition rather than pursuant to a request to admit under MCR 2.312. Accordingly, the admission was not conclusive, and plaintiff was permitted to rely on Birberick's deposition testimony in order to explain or contradict her testimony.

Plaintiff presented sufficient evidence to establish a genuine issue of material fact regarding whether she was a resident of Birberick's household at the time of the accident and was therefore entitled to PIP benefits as an "Additional Covered Resident" under Birberick's policy. Plaintiff testified that she resided at the Hudson Avenue home at the time of the accident.

At issue is whether Birberick resided with plaintiff. Although plaintiff testified that Birberick moved out of the Hudson Avenue home one month before the accident, Birberick testified that he was living with plaintiff and their daughter in the Hudson Avenue home at the time of the accident, and that he had lived with plaintiff continuously since the early 1990s. According to Birberick, at all times during the months surrounding plaintiff's accident, he intended to remain at the Hudson Avenue home rather than reside at his parents' home on Magnolia Parkway. Moreover, Birberick maintained possessions at the Hudson Avenue home, including furniture, cars, clothing, toothbrushes, towels, and a bed. He received mail at the Hudson Avenue home and had his own set of keys to the home. Despite this testimony, Birberick also presented contradictory testimony. For instance, he testified that he, plaintiff, and their daughter gradually moved into his parents' home on Magnolia Parkway over the course of 30 trips to move their belongings into the home. He could not remember if he moved into the Magnolia Parkway home before or after plaintiff's accident. In addition, the Magnolia Parkway address was listed on Birberick's driver's license and was listed as Birberick's address on the policy. Likewise, the Magnolia Parkway home was listed as plaintiff's address in the "Additional Covered Resident" section of Birberick's policy. Thus, viewing the evidence in the light most favorable to plaintiff, there exists a genuine issue of material fact regarding whether plaintiff was a resident of Birberick's household at the time of the accident and was therefore entitled to recover PIP benefits from defendant.

Defendant argues that plaintiff cannot create an issue of fact by submitting testimony that contradicts her clear and unequivocal testimony that Birberick was not living with her at the Hudson Avenue home at the time of the accident. Defendant relies on *Palazzola v Karmazin Prods Corp*, 223 Mich App 141, 155; 565 NW2d 868 (1997), which states that "a party may not raise an issue of fact by submitting an affidavit that contradicts the party's prior clear and unequivocal testimony." "[T]he rule is equally applicable to nonparty witnesses." *Id.* In *Palazzola*, the plaintiff, as personal representative of the decedent's estate, filed suit against the decedent's employer seeking to apply the intentional tort exception to the exclusive remedy provided in the Worker's Disability Compensation Act. *Id.* at 143-144. The decedent died as a result of exposure to Trichloroethylene (TCE), and the plaintiff alleged that the defendant had actual knowledge of the dangers of such exposure. *Id.* at 144-146. The plaintiff submitted an affidavit of an employee in an attempt to create a question of fact. *Id*. at 154. This Court recognized, however, that because the same employee previously provided clear and unequivocal deposition testimony that contradicted his affidavit, the plaintiff could not rely on the affidavit to establish a genuine issue of material fact for trial. *Id.* at 154-155.

We agree with plaintiff that *Palazzola* is distinguishable from the instant case. Unlike *Palazzola*, Plaintiff did not submit her own affidavit to contradict her prior clear and unequivocal deposition testimony. Rather, she relied on the deposition of another witness, which contradicted her testimony that Birberick was not living with her at the time of the accident. Therefore, the rule articulated in *Palazzola* is inapplicable in this case. Because there exists a question of material fact regarding whether plaintiff was a resident of Birberick's household at the time of

the accident, the trial court erroneously granted summary disposition for defendant.

Reversed and remanded for further proceedings. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219. We do not retain jurisdiction

/s/ William C. Whitbeck
/s/ Patrick M. Meter
/s/ Pat M. Donofrio